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**BEST INTENTIONS: RECONSIDERING BEST PRACTICES
STATEMENTS IN THE CONTEXT OF FAIR USE
AND COPYRIGHT LAW**

by JENNIFER E. ROTHMAN*

INTRODUCTION

Private ordering is increasingly playing a role in determining the scope of intellectual property (“IP”) rights both as a de facto and a de jure matter. Most often, this private ordering has been used to expand IP rights. In the copyright arena, for example, the clearance culture has established a baseline practice of asking permission and paying for all uses of copyrighted works — making fair use virtually obsolete in many contexts.¹ The development of digital rights management and technological protection measures has also severely constrained otherwise lawful uses of copyrighted works. To counteract both the clearance culture and the technology that some have prophesied as the “death of copyright,”² some proponents of more limited copyright laws and a broader fair use doctrine have proposed statements of best practices for fair use.

These best practices statements seek to encourage more individuals and companies to assert fair use.³ Best practices statements in the fair use context establish voluntary guidelines for what should be deemed fair uses of others’ copyrighted works. The majority of these statements have been drafted and disseminated by American University’s Center for Social Media.⁴ The Berkman Center for the Internet and Society and the Electronic

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¹ Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899 (2007).

² Glynn S. Lunney, Jr., *The Death of Copyright*, 87 VA. L. REV. 813 (2001).

³ The first best practices statement was called a “statement.” Subsequent statements have been termed “code[s].” Because the inaugural statement was termed “statement” and has been the most influential, I have chosen to refer to all of the guidelines as “statements” except when referring to the specific title of one of the codes.

⁴ See, e.g., CENTER FOR SOCIAL MEDIA, FAIR USE, available at http://www.centerforsocialmedia.org/resources/fair_use (last visited June 22, 2010) (providing best practices statements and codes for open courseware, dance-related materials, media-literacy education, online video, and documentary films). For an earlier effort to develop best practices in the fair use context, see Kirsten Thompson, *Report of the Ad Hoc Committee of the Society for*

Frontier Foundation (“EFF”), among others, have also embraced the best practices approach.⁵ Although such private ordering need not have an impact on de jure IP law, the drafters of these statements seek to influence the law itself in addition to shaping the de facto practices in particular communities.

As I have discussed elsewhere, the incorporation of industry practices and social norms into the law in the context of intellectual property is problematic.⁶ Even though custom can provide some guidance for determining the appropriate or reasonable scope of IP rights, industry practices and community norms must be aspirational in nature and ideally representative in their development before meriting any significant consideration by courts. As I will discuss, the best practices statements should not be viewed as particularly valuable customs for a variety of reasons, but especially because they are very one-sided, having been developed without input from the content owners whose work is likely to be used without permission and without compensation. This one-sided approach to custom is misguided as a normative matter and may also backfire because courts are more likely to incorporate restrictive practices that promote IP holders’ rights. In this essay, I contemplate the burgeoning best practices movement, its successes and its shortcomings and then suggest some potential changes going forward that would achieve many of the movement’s objectives without the troubling call for the incorporation of unrepresentative customary practices. I will begin by recognizing some of the de facto successes of the best practices movement and then consider some of my concerns about the project both on its own terms and normatively. Finally, I will make some suggestions about how the project could be redirected and could ultimately support law reform in the copyright context.

I. THE SUCCESSES OF THE BEST PRACTICES MOVEMENT

Best practices statements outside of the IP world have generally been developed to suggest some preferred solutions to a common problem that a particular industry faces. In the context of copyright law and fair use,

Cinema Studies, “Fair Usage Publication of Film Stills”, 32 *CINEMA J.* 3-20 (1993).

⁵ See, e.g., William W. Fisher & William McGeeveran, Berkman Center for Internet & Society, *The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age* 103-06 (2006), available at <http://cyber.law.harvard.edu/home/2006-09>; Fair Use Principles for User-Generated Content, available at http://www.eff.org/files/UGC_Fair_Use_Best_Practices_0.pdf (setting forth principles endorsed by, among others, EFF, the Berkman Center, and the Center for Social Media).

⁶ Rothman, *supra* note 1, *passim*.

the problem is the uncertainty and unpredictability of fair use.⁷ Despite language in some best practices statements that fair use is “not uncertain,”⁸ I suspect that the best practices statements were nevertheless largely motivated by the unpredictability or at least the perceived unpredictability of fair use. The statements also seek to provide education and guidance on fair use for particular communities with the goal of empowering users of copyrighted works to assert fair use.

In this essay, I will primarily focus on two examples of the best practices statements to demonstrate particular points. The two statements that I highlight are the *Documentary Filmmakers’ Statement of Best Practices in Fair Use* (hereinafter “*Filmmakers’ Statement*”) and the *Code of Best Practices in Fair Use for OpenCourseWare* (hereinafter “*OpenCourseWare Code*”).⁹ I have chosen these two statements in part because I have first-hand experience with each community — as a former documentary filmmaker and as an educator. I also refer to the *Filmmakers’ Statement* because it was the first best practices statement to be developed by the Center for Social Media and we now have more than four years of data about its effect in the context of documentary filmmaking.

For those unfamiliar with best practices statements in the context of fair use, I want to briefly set forth some of their features. The *Filmmakers’ Statement* presents four categories of uses of others’ copyrighted works that are likely fair in the context of documentary films. The privileged categories are critique or commentary, illustrative quoting, incidental uses (i.e., captured during the filming process), and use in historical sequences. Each of these categories contains a number of “limitations.” Such limitations include, for example, in the context of the category approving the use of “copyrighted works of popular culture to illustrate an argument or point,” a suggestion that documentarians should:

assure that the material is properly attributed . . . [that] quotations are drawn from a range of different sources[, that] each quotation . . . is no longer than is necessary to achieve the intended effect; [and that] the quoted material is not employed merely in order to avoid the cost or inconvenience of shooting equivalent footage.¹⁰

⁷ *Id.* at 1910-11 & n.28 (describing the dominant view of courts and scholars that fair use is murky and unpredictable).

⁸ *See, e.g.*, CENTER FOR SOCIAL MEDIA, DOCUMENTARY FILMMAKERS’ STATEMENT OF BEST PRACTICES IN FAIR USE 2 (2005) [hereinafter *Filmmaker’s Statement*] (“Fair use is flexible; it is not uncertain or unreliable.”), available at http://www.centerforsocialmedia.org/sites/default/files/fair_use_final.pdf.

⁹ CENTER FOR SOCIAL MEDIA, CODE OF BEST PRACTICES IN FAIR USE FOR OPENCOURSEWARE (2009) [hereinafter *OPENCOURSEWARE CODE*], available at <http://www.centerforsocialmedia.org/sites/default/files/10-305-OCW-Oct29.pdf>.

¹⁰ FILMMAKERS’ STATEMENT, *supra* note 8, at 4-5.

These particular limitations are not unreasonable, but I have some concerns with a number of the other limitations, as I will discuss.

The *OpenCourseWare Code* sets forth five categories of uses favored for fair use. Three of the five categories overlap with those set forth in the *Filmmakers' Statement*: incidental uses, uses for critique & analysis and illustrative uses. Two additional categories are then added that favor demonstrative or explanatory uses, and assigned and supplementary materials. Once again, each category contains a number of significant limitations. The category of uses of copyrighted works for demonstrative or explanatory uses, for example, is limited to circumstances when the use is not "cumulative," there is "[n]o ready substitute (including one that the instructor himself or herself could create with reasonable effort) [available]," the extent of the use is appropriate, and attribution is provided where "reasonably possible."¹¹

Shortly after its publication in 2005, the *Filmmakers' Statement* had an immediately positive effect in combating the clearance culture. Errors & Omissions ("E & O") insurers and production companies reconsidered their policies and became more willing to insure, produce, and distribute documentary films that had not licensed all copyrighted material included within the films.¹² If a filmmaker claimed that the uses were fair and that he or she had complied with the terms of the *Filmmakers' Statement*, then E & O insurers were willing to issue insurance. Distributors and producers also became more willing to rely on fair use. Seven weeks after the release of the *Filmmakers' Statement* a number of filmmakers were able to release films at the Sundance Film Festival that had been in jeopardy of not being screened because of clearance problems.¹³ PBS and the Independent Film Channel ("IFC") have also relied on the *Filmmakers' Statement* to develop their own internal standards and practices.¹⁴

¹¹ OPENCOURSEWARE CODE, *supra* note 9, at 13-14.

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¹² Pat Aufderheide & Peter Jaszi, *Fair Use and Best Practices: Surprising Success*, INTELL. PROP. TODAY a, b (Oct. 2007); Pat Aufderheide et al., *Fair Use Frequently Asked Questions* (Dec. 2007), <http://www.centerforsocialmedia.org/fair-use/best-practices/documentary/fair-use-frequently-asked-questions>.

¹³ Aufderheide & Jaszi, *supra* note 12, at a. Notably, after the release of the *Filmmakers' Statement*, Kirby Dick's film, *This Film is Not Yet Rated*, which had been in jeopardy of being pulled from the competition because of its use of more than 100 unlicensed movie clips from various films, was screened and subsequently distributed theatrically and on home video. *Id.*; Pat Aufderheide, *How Documentary Filmmakers Overcame their Fear of Quoting and Learned to Employ Fair Use: A Tale of Scholarship in Action*, INT'L J. COMM. 26, 33-34 (2007).

¹⁴ Aufderheide, *supra* note 13, at 34; Aufderheide & Jaszi, *supra* note 12, at a.

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The *Filmmakers' Statement*, however, has not been as successful with bigger players in the industry. Many distributors still demand clearance and the overall film and television communities remain very much at the heart of the clearance culture. Nor has compliance with the best practices statements stopped copyright holders from suing if they do not think a use is fair.¹⁵ Importantly, the *Filmmakers' Statement* has not had an influence outside documentary films, so the dominant practice in fiction films remains clearance. Accordingly, courts that look to industry customs might well rely on the broader *film* customs rather than on the smaller subculture of *documentary* films.

Despite the successes of the *Filmmakers' Statement*, I suspect that the breakthrough in counteracting the clearance culture was driven less by the statement itself and more by the public relations drive surrounding its release, the development of legal clinics to support filmmakers if they were sued, and Stanford University's offer to insure any documentary filmmakers who could not obtain insurance but who had viable fair use claims.¹⁶ In other words, the empowerment to assert fair use came from the movement itself, not from any legal change driven by the *Filmmakers' Statement*. The movement has generated a coalition willing to mobilize on behalf of fair use and those who assert it and has set in motion a successful public relations effort to inform the media, the public and various communities of the legitimacy of fair use.

In addition to counteracting the clearance culture, the best practices statements have a number of other benefits. The statements are often preceded by a study of the types of uses in a given community of users, such as documentary filmmakers. These studies and the statements themselves document the needs of a given community, the challenges that the copyright system presents for a community, and the community's current practices. This information is important for legal reform, as well as for interpreting the current law. The statements also serve to educate communities about fair use and copyright law so that members of those communities can feel more qualified and emboldened to assert fair use.

¹⁵ See, e.g., *Aguiar v. Webb*, No. 1:07CV1167371-2 (D. Mass.) (pending). In *Aguiar*, the plaintiff filed and pursued a copyright infringement suit despite the claim by the defendant that he had complied with the *Filmmakers' Statement*. See Amended Complaint (filed on Mar. 24, 2008); Answer to Restatement of Counterclaim (filed May 23, 2008).

¹⁶ See Posting of Colette Voge to Center for Internet and Society Webpage, Stanford University, Insurance Resource for Documentary Filmmakers (Feb. 27, 2007), <http://cyberlaw.stanford.edu/node/5209>. Cf. Aufderheide & Jaszi, *supra* note 12, at a (discussing Stanford University's Fair Use Project and its commitment to defend filmmakers who comply with the *Filmmakers' Statement*).

Accordingly, the best practices statements have value even if their terms are not used to set de jure boundaries of fair use.

As a legal matter, the statements could also support good faith defenses should fair use be litigated. A willful violation of copyright law risks statutory damages up to \$150,000 per incident.¹⁷ If courts view compliance with best practices statements as demonstrations of good faith, this would be a significant aid to users and would likely help to incentivize the assertion of fair use.

II. CONCERNS WITH THE BEST PRACTICES STATEMENTS

Despite the potential benefits of the best practices statements, I have some significant reservations about them, at least in their current formulation. Many of the conclusions contained within the statements are more wishful thinking than reality. This wishful thinking takes the form of a misleading characterization of community practices, the role of custom in copyright law and the scope of fair use. This lack of an accurate picture of the law is particularly unfortunate because the statements play a role in educating a lay audience about copyright law. Additionally, even if the statements were accurate portrayals of the law and practices of the relevant communities, the statements do not deserve judicial deference. I will address these concerns in turn.

A. *Wishful Thinking About the Parameters of Fair Use*

The best practices statements, although purporting to objectively state the principles of fair use, ultimately state what the drafters wish fair use was. First, the statements claim that fair use is certain, presumably in an effort to produce confidence in relying on fair use. But fair use is far from certain — cases point in different directions and cases are often overturned on appeal.¹⁸ Moreover, some of the limitations contained within

¹⁷ See 17 U.S.C. § 504(c)(2) (2006) (authorizing statutory damages of up to \$150,000 for willful copyright infringements). Willful infringements also expose defendants to criminal liability. See *id.* § 506.

¹⁸ Compare, e.g., *Ringgold v. Black Entm't Television*, 126 F.3d 70, 80–81 (2d Cir. 1997) (rejecting a fair use defense for the use of a copyrighted poster that appeared for less than thirty seconds in the background of a scene in a television sitcom) with *Amsinck v. Columbia Pictures Indus.*, 862 F. Supp. 1044 (S.D.N.Y. 1994) (holding use of plaintiff's copyrighted mobile in a film a fair use even though it was sometimes shown in close-up and appeared on screen for over one and a half minutes). I note that the Second Circuit decision in *Ringgold* reversed the district court's holding that the use of the poster was fair. It is common for district courts and appellate courts to reach different conclusions about fair use. Another example besides *Ringgold* is the Eleventh Circuit's reversal of a district court's holding that a book based on the famous novel *Gone With the Wind* was likely not a fair

the statements create their own uncertainties — for example, figuring out when one has used “more than necessary to make a point” may be as unpredictable and uncertain as the broader fair use analysis.

The best practices statements also overemphasize the importance of transformativeness in determining fair use, repeatedly suggesting that if a use is transformative, the use is likely fair.¹⁹ Although transformativeness can be an important consideration, it is not determinative and cannot reasonably be characterized as the most important fair use factor — in fact, it is not an enumerated factor at all. Transformativeness is often viewed narrowly and courts have frequently concluded that simply putting a copyrighted work in a new context is not sufficiently transformative to merit a finding of fair use.²⁰

The market effect of a use is usually the most important factor in determining fair use and is left out almost entirely from some of the statements. A number of scholars, most notably Barton Beebe, have concluded based on an empirical analysis of cases that the market effect factor is the most important factor in predicting whether a use is fair.²¹ In fact, the transformativeness of a use can be irrelevant if such uses are determined to harm a likely market for the copyright holder, including a potential licensing market. In *Campbell v. Acuff-Rose Music Inc.*, for example, the Supreme Court suggested that the defendant’s use was likely a fair one in part because it was transformative, but also because the Court was skeptical that Roy Orbison would have licensed a critical parody of his song, *Pretty Woman*. Accordingly, there was no likely market harm. The Court, however, remanded for a factual determination on this very issue — suggesting that if there had been an existing or likely market in rap versions of the song then the transformative use might not have been fair.²² Despite the importance of the market effect factor, many of the best practices statements either leave out this factor entirely or unreasonably downplay its importance. The best practices statements thereby mis-

use. *Compare* SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001) with *SunTrust Bank*, 136 F. Supp. 2d 1357, 1370-84 (N.D.Ga. 2001).

¹⁹ See, e.g., FILMMAKERS’ STATEMENT, *supra* note 8, at 2; OPENCOURSEWARE CODE, *supra* note 9, at 4-5 (although mentioning that injury to copyright holders’ earnings has some relevance, listing only “transformativeness” and “amount used” as “core” considerations in determining fair use).

²⁰ See Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463, 490-92 (2010).

²¹ See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 584-86, 616-17 (2008) (determining that 83.8% of the time the evaluation of market harm correlates with the outcome of dispositive opinions). See also Rothman, *supra* note 20, at 483 n.99.

²² 510 U.S. 569, 593-94 (1994).

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lead readers and potentially increase the likelihood that judges will quickly dismiss the statements.

The best practices statements also often ignore case law that is not favorable to the communities or uses addressed by the statements. For example, the *OpenCourseWare Code* does not address the course packet cases in which courts have held that the copying of assigned materials for course packets is not fair use.²³ There may be bases on which to distinguish the uses of material for open courseware, but it is a significant oversight to not address these cases at all.

B. Problematic Limitations

Even if the best practices statements gave a more accurate picture of fair use, the statements have a number of other concerning features. As I mentioned, the statements seek to establish guidelines for uses of copyrighted works — setting forth parameters that make uses fair or unfair. Each of the statements contains express “limitations” on categories of uses that would otherwise be fair. Some of these limitations are overly limiting and restrict the scope of what should be deemed fair. Although the drafters of the statements point out that they do not intend the statements to set forth the full scope of fair use, uses that exceed the limits of these statements are likely to be viewed as suspect. This is not idle speculation on my part. We have seen this happen before in copyright law — most notably in the context of the “Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions,” commonly referred to as the “Classroom Guidelines.” While drafting the fair use section of the 1976 Copyright Act, Congress recruited industry representatives — in particular, publishers — to develop their own guidelines for what constituted fair use of writings and music in an educational setting. Although these voluntary guidelines were supposed to set forth minimum, safe harbors for fair use, in practice they have set forth maximums.²⁴ More than 80% of universities have set forth internal guidelines limiting uses to those which comply with the Classroom Guidelines, and courts have viewed non-conformity with the Guidelines as a basis for liability.²⁵ Although it is too early to have similar evidence about the effect of the best practices statements, it is reasonable to suspect that lack of conformity with the best practices statements may well draw a lawsuit, lead a court to find liability and justify a conclusion that a user acted in bad faith.

²³ See *OPENCOURSEWARE CODE*, *supra* note 9, *passim*. For a discussion of the course packet cases see Rothman, *supra* note 1, at 1935, 1940, 1953-54.

²⁴ *Id.* at 1918-20.

²⁵ *Id.* at 1918-21, 1940-41.

The likelihood that the best practices statements will set the ceiling rather than the floor of fair use is particularly concerning because some of the parameters of the statements are more limiting of fair use than I and other members of the various communities would agree to and more limiting than fair use demands. Without analyzing every limitation contained within the statements, I will highlight a few that I find particularly problematic. The *Filmmakers' Statement*, for example, limits incidental uses of music captured on film so that an editor and director cannot cut or edit a scene or sequence to the beat of the captured music or allow the music to spillover to another scene.²⁶ Cutting to the rhythm of the music is an integral part of the craft of filmmaking and allowing music from one scene to spillover during a scene transition is an important technique. If the music is captured incidentally, rather than purposefully, it should not matter how the filmmaker constructs the scene in post-production as long as the incidentally captured material is not substantially divorced from the situation in which it was incidentally recorded. Cutting to the beat of the music or smoothing out a scene transition does not unmoor the incidentally copyrighted works from the setting in which they were captured.

The *Filmmakers' Statement*, in the context of using copyrighted works in historical sequences, also suggests that projects that are designed around copyrighted material are not fair use.²⁷ This suggestion seems out of sync with the demands of filmmakers. Documentary projects should continue to be able to be designed around copyrighted works. For example, documentaries about war movies, Elvis, or the portrayal of gay characters in film and television should be considered legitimate projects, even though they each revolve around copyrighted works. To throw all such films into a disfavored category is especially concerning when so much of our culture — that a filmmaker might want to comment on — is composed of copyrighted works.

The *OpenCourseWare Code* similarly restricts uses in ways that exceed those that fair use requires and in circumstances in which there are good reasons for the relevant community to reject the recommended limitation. The code places significant burdens on educators. For example, while incidental uses of copyrighted works in open courseware is viewed overall as a category favoring fair use, educators must first try to remove the copyrighted material before being able to claim fair use.²⁸ There is no explanation for why educators should have to make such an effort. If the use is fair, it should not be solely because the material was inseparable. The code also limits illustrative and explanatory uses to one example or

²⁶ FILMMAKERS' STATEMENT, *supra* note 8, at 5.

²⁷ *Id.* at 5-6.

²⁸ OPENCOURSEWARE CODE, *supra* note 9, at 10-11.

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illustration per point.²⁹ As any experienced teacher knows, students learn through repetition — why shouldn't examples be able to be cumulative? The code also states that copyrighted works should not be used if other material could be created by the educator independently or non-copyrighted works could be substituted. These limitations concede far too much ground to copyright holders.

Thus far I have identified several very specific limitations with which I take issue, but there are also larger concessions that the drafters of these best practices statements make that raise concerns. Many of the statements suggest a preference for licensing when material is easily available at reasonable rates.³⁰ This preference for licensing continues to make non-licensed uses suspect, the very task that the best practices statements were supposed to counteract. By doing so, the best practices statements ironically further endorse the “celestial jukebox” concept that limits fair use only to situations involving market failure.³¹

Many of the statements require that attribution be provided when any uses are made and attribution is feasible.³² The drafters of the best practices statements do not explain why attribution should be required. With the exception of the Visual Artists Rights Act of 1990, which confers a right of attribution on creators of visual art, U.S. copyright law does not require attribution.³³ Nor have fair use evaluations turned on attribution. Although I am generally supportive of adding some attribution requirement for uses of copyrighted works,³⁴ it is nevertheless a condition that potentially narrows fair use from its existing parameters without providing a justification for doing so.

It is likely that many of these limitations were driven by an effort to appear objective or at least to take into consideration the interests of content providers — who were not directly represented in the development of the best practices statements. These limitations, however, concede too

²⁹ *Id.* at 12-13.

³⁰ *See, e.g., id.* at 13-14 (suggesting that if there is an available licensing regime educators should license demonstrative and explanatory uses, as well as supplementary and assigned readings).

³¹ PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 139, 188-216 (rev. ed. 2003); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 *passim* (1982) (suggesting that fair use should only apply when there is market failure). I have previously critiqued this model of fair use. *See* Rothman, *supra* note 20, at 532-33.

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³² *See, e.g.,* OPENCOURSEWARE CODE, *supra* note 9, at 11-14.

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³³ Codified as 17 U.S.C. § 106A. Not only is visual art narrowly defined, but the right can be waived. *See* 17 U.S.C. §§ 101, 106A(e)(1) (2006).

³⁴ Rothman, *supra* note 1, at 1971, 1975 (concluding that attribution customs are more worthy of consideration in IP cases than many other customs).

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much and given the questionable validity of the statements as a basis to expand fair use, it would be particularly tragic if the statements instead formed a basis to restrict fair use.

C. *Misleading About the Role of Custom*

The best practices statements suggest that industry practices and user norms are frequently incorporated into the law to determine the scope of fair use, often being used as a basis to find uses fair. All of the statements contain language similar to the following from the *Filmmakers' Statement*: "Fair use is shaped, in part, by the practice of the professional communities that employ it. . . . [F]or any particular field of critical or creative activity, such as documentary filmmaking, lawyers and judges consider professional expectations and practice in assessing what is 'fair' within the field."³⁵ This language both oversells the impact of industry practices in determining fair use and undersells the incorporation of industry practices to limit the scope of permissible uses. As I have documented in prior work, when courts have considered industry practices in the context of copyright law, they have most often done so to contract rather than to expand fair use.³⁶

Even if a community's practices could serve as a basis to establish fair use, the best practices statements do not in fact document the practices of the relevant communities. Instead, they describe what the drafters think a community should be doing, rather than what the community is actually doing. The *Filmmakers' Statement* and the report that preceded it both documented that filmmakers licensed or cut out copyrighted materials from their works.³⁷ These risk-averse practices are not ideal, but there is little dispute that these were the dominant practice at the time the *Filmmakers' Statement* was written. Even though there has been some shift in practices since the release of the *Filmmakers' Statement* — with more filmmakers asserting fair use — there remain many filmmakers, producers and distributors who continue to prefer to license or cut out material. The fact that such risk-averse practices have at times been dominant and continue to be in use should make the proponents of the best practices approach and others wary of endorsing the incorporation of custom to define the scope of fair use — such an incorporation may narrow rather than expand fair use. As suggested, the greatest danger of such best practices statements is that they will encourage courts to view industry practices as legiti-

³⁵ FILMMAKERS' STATEMENT, *supra* note 8, at 1-2.

³⁶ Rothman, *supra* note 1, at 1902-06, 1918-21, 1931-44.

³⁷ FILMMAKER'S STATEMENT, *supra* note 8, at 1, 3, 7; PATRICIA AUFDERHEIDE & PETER JASZI, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS 5, 7-25, 29 (2004), available at <http://centerforsocialmedia.org/rock/index.htm>.

mate bases for determining the scope of fair use. In such a world, the dominant clearance culture practices are likely to trump those set forth wishfully by a public interest organization for a much smaller group that wants to use works without permission. Accordingly, the best practices statements might lead to more consideration of industry practices and community norms, but not the ones that the proponents of best practices statements want.

To date, no court that I am aware of has evaluated the legal effect of best practices statements related to fair use. In contrast, many courts have relied on industry practices, such as risk-averse licensing or limiting fair use guidelines, to reject fair use claims. When courts do ultimately consider the best practices statements, I am skeptical that they will embrace them as a basis to find fair use. I suspect that courts are more likely to share Universal Music's view that such statements "make good reading for the self-described "free culture" crowd, but they are nowhere to be found in the DMCA or the Copyright Act."³⁸

D. The Current Best Practices Statements Have Limited Value as Customs Worthy of Judicial Deference

As I have elaborated upon elsewhere, the fact that something is customary should never be determinative of IP rights or of the countervailing scope of fair use.³⁹ Accordingly, I do not think that custom should be incorporated wholesale into determinations of fair use. Nevertheless, custom may provide some guidance into what is reasonable or appropriate, and thereby likely fair. I have developed six vectors that should be considered when evaluating whether industry practices or norms are more or less valuable as indications of what is reasonable or appropriate. These vectors are: (1) the certainty of the custom, (2) the motivation for the custom, (3) the representativeness of the custom, (4) and (5) the application of the custom (against whom and for what type of proposition), and (6) the implications of the adoption of the custom as the governing rule.⁴⁰ An analysis of these six vectors indicates that the best practices statements are not high-value customs worthy of judicial or other deference.

1. Certainty of Custom

To have any value, a custom must be identifiable, in terms of what constitutes the practice itself, and the practice must also be widely ac-

³⁸ Universal Music Group, Motion to Dismiss, *Lenz v. Universal Music Corp.*, No. C.07-3783 (N.D. Cal., May 23, 2008) (referring to EFF's Fair Use Principles for User Generated Video Content).

³⁹ Rothman, *supra* note 1, at 1946-80.

⁴⁰ *Id.* at 1967-80.

cepted and followed. As I have developed elsewhere, several considerations help to evaluate how certain a particular custom is. “First, if there is unanimity as to the custom across a diverse set of parties and interests, then the custom is likely to exist and have clearly definable boundaries. Second, customs that are long-standing are more stable and hence more certain because they have weathered the test of time.”⁴¹ As discussed, the best practices statements themselves create the practices, rather than accurately describing them. The *Filmmakers’ Statement*, for example, was preceded by a report that emphasized that documentary filmmakers were very much a part of the clearance culture. The *Filmmakers’ Statement* sought to change this behavior and to some extent has successfully done so, but the statement hardly codified then-existing practice. Even nearly five years later, the *Filmmakers’ Statement* has not uniformly been adopted as practice. Although some prominent media organizations have adopted the statements, such as PBS and IFC, many other networks and studios have not done so. Even if the vast majority of documentary filmmakers now abide by the *Filmmakers’ Statement* — which has not yet been established — the *Filmmakers’ Statement* is certainly not long-standing and therefore it is of limited value because the practices have not had time to reach equilibrium. Accordingly, the practices of the documentary community are not sufficiently certain for them to be of high value in this vector of analysis.

2. *Motivation for Custom*

Customs that develop to avoid litigation or to preserve relationships do not provide meaningful information about the optimal scope of fair use.⁴² The best practices statements were driven in part by an aspirational purpose — to develop an understanding of what should be fair given a community’s needs.⁴³ But the statements also, and perhaps primarily, provide a mechanism for avoiding litigation. The best practices statements take for granted the current legal regime and then try to shift it to better represent certain interests. The statements do not start from a clean slate and consider what fair use should look like; instead the statements simply purport to set forth the existing law. These reactive customs, developed to address the shortcomings of the legal regime, are not the sort of aspirational, independently developed customs that others, such as Robert El-

⁴¹ *Id.* at 1969-70.

⁴² *Id.* at 1970-72.

⁴³ I note that I have had somewhat of a change of heart in this regard. I initially thought that the best practices statements were solely driven by litigation avoidance, but as the movement has developed I think there is also an effort to develop what are deemed reasonable or appropriate parameters of fair use for particular communities.

lickson, have discovered in other contexts.⁴⁴ This is not “order without law,” but instead ordering within law, or at least the law as the drafters wish it to be. Accordingly, the best practices statements are at best of mixed value along this vector.

3. *Representativeness*

The biggest liability for the best practices statements in terms of their value as custom worthy of some judicial consideration is that they were developed in a highly unrepresentative manner. Customs that represent only one party's or one group's interests are suspect. By contrast, when a custom develops with input and participation of both IP owners and users and large and small players in the IP industries, it is more meaningful.⁴⁵ The best practices statements are more one-sided than the Classroom Guidelines (which the authors of the best practices statements criticize for being one-sided).⁴⁶ None of the best practices statements that I have reviewed has included representation of content providers whose work is most likely to be used by the relevant community. Simply saying that some of the users in the relevant community are also content producers does not remedy this one-sidedness. After all, almost everyone — if not absolutely everyone — creates copyrighted works. Although I doubt that much consensus would be reached if the copyright holders whose works were likely to be used were included, the lack of any attempt to bring them into the discussion highlights the one-sidedness of the statements. Moreover, the fact that it is unlikely that the two (or more accurately many different) sides could agree on any common principles should raise serious flags about looking at norms and practices in any one community to determine the scope of fair use when applied outside that community. Not only do the statements not include major content providers in their development, but members of the broader public — another major party with a stake in the scope of fair use — was also not included. Even within the community, few members were consulted. Accordingly, the guidelines set forth in the best practices statements are of limited value because they were developed in an unrepresentative manner.

⁴⁴ See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

⁴⁵ Rothman, *supra* note 1, at 1972-74.

⁴⁶ See, e.g., CENTER FOR SOCIAL MEDIA, *THE CODE OF BEST PRACTICES IN FAIR USE FOR MEDIA LITERACY EDUCATION*, available at <http://www.centerfor-socialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-media-literacy-education>; RENEE HOBBS ET AL., *THE COST OF COPYRIGHT CONFUSION FOR MEDIA LITERACY 6-7* (2007), available at http://www.centerforsocialmedia.org/sites/default/files/Final_CSM_copyright_report_0.pdf.

4. *Application of Custom Against Whom and for What Proposition*

Proponents of the best practices statements want to apply the statements for the normative proposition of what is the appropriate scope of fair use and they want to apply it as a defense to copyright infringement against parties who were not involved in negotiating the statements. Although there are some aspirational pieces within the best practices statements, it is not sufficiently aspirational in nature to merit deference as to the scope of fair use. Nor should its guidelines be applied outside the communities that developed the statements. Because the likely plaintiff copyright holders had no say in the development of the practices it would be inappropriate to use the best practices statements as a defense in the context of a claim for copyright infringement. It also would be inappropriate to hold members of the subcommunity at issue (e.g., documentary filmmakers) to the terms of the best practices statement if they were not adequately represented.

5. *Implications*

Customary practices must be independently evaluated to determine whether a particular industry practice or community norm is appropriate for judicial adoption in resolving a dispute over the use of another's copyrighted work.⁴⁷ Courts must independently consider the effect of adopting a particular custom on creators, copyright holders, users, and the public at large. One pertinent consideration in such an evaluation is whether incorporation of that practice will ultimately lead to a slippery slope, such that no uses will be allowed, or, alternatively, that too many uses will be allowed. Consider, for example, two extremes. If it is customary to license everything, then no fair uses remain. Similarly, if it is customary to swap music online, then there will be no remaining rights of IP holders available to restrict the copying of music in digital formats. In either case, such slippery slope customs should be dismissed.⁴⁸

The likely effect of each best practices statement is different and I cannot fully explore the implications here, but I want to highlight at least one instance in which there is a real slippery slope danger. In the statement related to user-generated content (in the context of online video) virtually any use is deemed fair because the commentary and critique category is read very broadly. For example, in the report supporting the Online Video Code, the drafters suggest that a mash-up titled *Clint Eastwood's "The Office"* — which mixed together clips from the television series *The Office* with the movie *Evan Almighty* to show what it would be like if Clint Eastwood directed an episode of *The Office* — falls within the

⁴⁷ Rothman, *supra* note 1, at 1976-77.

⁴⁸ *Id.*

favoured category of “negative or critical commentary.”⁴⁹ This opens up the door so wide that there can be no market for licensing material for such mash-ups. I do not think fair use demands such an expansive reading; there could be significant market harms to an industry struggling to find a revenue model in the context of new media if fair use were so broadly interpreted.

III. A WAY FORWARD

Despite my critique of the best practices statements, I am supportive of some of the broader goals of the movement. Users must be more aggressive in asserting fair use and there must be more support and encouragement for their doing so. Providing more education on fair use, litigation support, media exposure, and advocating for compulsory licensing and other law reforms are crucial to the success of such efforts. Indeed, I recommend shoring up such support for fair use by developing even more IP clinics, not just for litigation support, but also to generate fair use opinion letters, conduct educational outreach and do more media outreach. The best practices statements, however, are not crucial to these larger objectives and related support. In fact, as I have noted, the statements may undermine the very goals sought to be achieved. Most importantly I reject the best practices statements’ call for the incorporation of custom to determine the scope of intellectual property rights.

Although I do not support the wholesale adoption of any form of best practices statement as law, there are some ways to make the statements more worthy of some judicial consideration. First, why not bring in content providers and larger players and see if there actually are any areas of agreement? To the extent there are not, the best practices statements could transform into documents of organized dissent from the dominant clearance culture and other restrictive customs.⁵⁰

Second, the statements could shift from pretending to document actual practices to stating what communities deem fair and why — taking a more explicitly normative approach. Alternatively, the statements could be reconfigured to analyze current fair use precedents and give more specific legal guidance.

⁴⁹ CENTER FOR SOCIAL MEDIA, CODE OF BEST PRACTICES IN FAIR USE FOR ONLINE VIDEO 4-5 (2008), *available at* http://www.centerforsocialmedia.org/sites/default/files/online_best_practices_in_fair_use.pdf. See also CENTER FOR SOCIAL MEDIA, RECUT, REFRAME, RECYCLE: QUOTING COPYRIGHTED MATERIAL IN USER-GENERATED VIDEO 8-9 (2008), http://www.centerforsocialmedia.org/sites/default/files/CSM_Rcut_Reframe_Recycle_report.pdf.

⁵⁰ Rothman, *supra* note 1, at 1980-81 (advocating for dissent from restrictive customary practices).

Third, the best practice statements could be retooled to provide guidance for future law reform. For example, the supporting survey information generated by the best practices statements and the guidelines contained within them emphasize that across many communities both users and creators prefer attribution. This is not surprising because attribution norms exist where copyright law does not apply or where it is rarely obeyed or enforced.⁵¹ The common practice of attribution suggests a principle that users and owners are likely to agree on and in which there could be some legal reform to codify a broader right of attribution.

Using community-driven approaches to investigate needed uses of copyrighted works and community norms can illuminate areas in which the law is so out of step with public understanding that something must change. Copyright law, like all law, needs some public opt-in to be meaningful. We should not, however, rely on courts to embrace such social movements. Such efforts are not only likely to be futile, but worse yet may backfire. Instead, the populist sentiment that copyright law has become bloated and that fair use is illusory should be used to activate legislative momentum to contract copyright law and reaffirm the importance and reliability of fair use. The legal and academic communities must also expand low-cost or pro bono services for those who have colorable fair use claims but cannot afford to defend themselves if their uses are challenged.

⁵¹ Rothman, *supra* note 1, at 1925-26, 1929-30, 1971-72, 1975-76.

